

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

AMERICAN FEDERATION OF STATE,
COUNTY & MUNICIPAL EMPLOYEES,
COUNCIL 77, AFL-CIO

Employer

and

Case 9-UC-472

UNITED STAFF UNION-WEST VIRGINIA

Union

**REGIONAL DIRECTOR'S DECISION AND
ORDER**

The Employer, American Federation of State, County & Municipal Employees, Council 77, AFL-CIO, is a labor organization based in Charleston, West Virginia. The Employer represents state and local government employees in numerous local unions throughout West Virginia. It is governed by an executive board elected at biennial statewide conventions and, since June 2001, it has employed three staff members: an executive director, an administrative secretary and a council representative. The Union, United Staff Union-West Virginia, presently represents the Employer's employees in the following unit described in the extant collective-bargaining agreement:

The [Employer] recognizes the [Union] as the sole and exclusive collective bargaining agent for the purpose of negotiating salaries and other conditions of employment for all employees of [Employer] excluding the Executive Director and temporary employees.

A hearing officer of the Board held a hearing and the parties filed briefs with me.

The Employer seeks to clarify the current unit to exclude the administrative secretary on the grounds that she is a confidential employee. Specifically, the Employer maintains that the administrative secretary has new duties and works in a confidential capacity to the executive director, who formulates, determines and effectuates labor relations policy. The Union opposes the clarification on the basis that: (1) the administrative secretary does not serve the executive director in a confidential capacity with a labor nexus; (2) she has a community of interest with the council representative; (3) the existing bargaining unit should not be disturbed; and (4) changes in her job

duties have not been documented as required by the contract. The Union also contends that the petition is not properly before the Board because it was not authorized by the Employer's executive board. On the otherhand, the Employer argues that the petition is appropriate because: (1) the Board is required to determine the status of confidential employees in an existing unit; (2) the petition was filed shortly before the contract's expiration; and (3) the Employer has undergone recent substantial changes. The clarification sought by the Employer would reduce the unit from two employees to one employee.

I have considered the evidence and the arguments presented by the parties on all issues and have concluded that the petition is properly before the Board. I have also concluded that the administrative secretary is not a confidential employee. Accordingly, I will not clarify the unit to exclude this position and will dismiss the petition.

To provide a context for my discussion of the issues, I will first provide an overview of the Employer's operations. I will then present, in detail, the facts and reasoning that supports each of my conclusions.

I. OVERVIEW OF OPERATIONS

Since June 2001, the Employer has employed only an executive director, who is excluded from the unit, an administrative secretary and a council representative. In contrast, when the Employer recognized the Union around January 1, 1998, the collective-bargaining unit consisted of three council representatives and one administrative secretary, all working under the direction of the executive director.

The Employer implemented significant changes in its operations after a \$70,000 annual subsidy from the International Union was discontinued in May 2001. Thus, two of the three council representatives were laid off in June 2001, and Ed Hartman, the executive director, assumed some of their duties. Thereafter, Hartman spent more time out of the office on lobbying and representational activities. The remaining council representative, Kevin Church, who had formerly serviced local unions in the northern third of West Virginia, was assigned to service local unions throughout the state. The record is not clear regarding the effects of the layoff on the administrative secretary's job. Nancy Canterbury, who had held the administrative secretary position from November 1999, resigned in October 2001. Thereafter, the position has been filled by successive temporary employees, who are specifically excluded from the unit on that basis. However, the Employer has recently advertised for a permanent administrative secretary.

II. APPROPRIATENESS OF THE PETITION

Contrary to the Union's position, I find that the clarification petition is properly before me for resolution. Generally, two requirements must be met for an appropriate clarification petition. First, the party seeking to clarify a bargaining unit must show a

dispute exists as to unit placement. Second, it must be established that recent changes in the unit mandate a change in the unit description.

A. A Dispute Exists as to Unit Placement

Regarding the first requirement, the record shows that the Employer recently opened the current contract for bargaining and the parties are preparing to enter negotiations. The Employer informed the Union of its intent to exclude the administrative secretary from the unit as a confidential employee and the Union opposed the exclusion. Accordingly, I find that a dispute exists over the unit placement of the administrative secretary position, which may properly be resolved at this time by means of a unit clarification proceeding. *University of Dubuque*, 289 NLRB 349 (1988); *Crown Cork & Seal Co.*, 203 NLRB 171 (1973).

B. Recent Changes in the Unit

A party seeking unit clarification must show that there have been “recent substantial changes in the [employer’s] operations,” *Batesville Casket Company, Inc.*, 283 NLRB 795 (1987), or that the jobs in issue are new or substantially changed since the parties entered into their last contract. *The Washington Post Company*, 256 NLRB 1243 (1981). The record shows that the unit changed substantially in May 2001, when two of the three council representatives were laid off. As a result, the duties of Executive Director Hartman, Council Representative Church and the administrative secretary were modified. Thus, there have been recent substantial changes in the unit.

C. The Failure of the Employer’s Executive Board to Approve the Filing of the Petition

The Union also argues that the petition cannot be entertained because the Employer’s Executive Board did not approve the filing of the petition. I reject this argument. Although the executive director may have acted outside his authority in filing the petition, this factor alone does not affect my determination as to whether the petition is appropriate. I find that the petition raises an issue regarding the interpretation of the Board’s standards for determining an employee’s confidential status, which is an appropriate issue for clarification. See, *Savage Arms Corporation*, 144 NLRB 1323 (1963). I also reject the Union’s argument that there could not have been any changes in the job duties of the administrative secretary because the Union and the Employer did not negotiate a new written job description for the position. I find that the failure of the parties to agree on a new job description for the position does not automatically preclude the assignment of new confidential duties to the administrative secretary.

D. Conclusion

In view of the dispute between the parties over the unit placement of the administrative secretary and the recent changes in the Employer’s overall operations, I find that it is appropriate to review the changes in the administrative secretary’s duties

to determine whether the administrative secretary is a confidential employee. Having carefully reviewed the evidence and arguments of the parties, I find, for the following reasons, that the administrative secretary's position is not confidential.

III. CONFIDENTIAL STATUS OF THE ADMINISTRATIVE SECRETARY

A. The Applicable Legal Standard

The Board's long established test for determining an individual's confidential status is based on whether that person, "assists and acts in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations." *S. S. Joachim & Anne Residence*, 314 NLRB 1191, 1195, 1196 (1994), citing *B. F. Goodrich Co.*, 115 NLRB 722 (1956); see also, *Bakersfield Californian*, 316 NLRB 1211, 1212 (1995). This "labor nexus" test was approved by the Supreme Court in *NLRB v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170 (1981). The Board, with Supreme Court approval, has applied the definition of confidential employees to carve out a very narrow group of employees. *Hendricks County*, supra. Moreover, it is well settled that the burden of proving an employee's confidential status rests on the party asserting such status. *Intermountain Rural Electric Association*, 277 NLRB 1 (1985). I find that the Employer has not met that burden.

B. An Overview

The Employer contends, in substance, that due to changes in its operation after the June 2001 reduction in force, the administrative secretary is now a confidential employee and it is inappropriate to include her in the current unit. Although there have been changes in the Employer's operations and in the duties of its employees, the evidence does not support a finding that the administrative secretary is now a confidential employee who should be clarified out of the unit. Rather, the Employer merely speculates that it will assign her confidential duties with a "labor nexus" in the future. In finding that the unit should not be clarified to exclude the administrative secretary I have reviewed and considered: (1) the Employer's organizational structure; (2) the responsibilities of its staff members; (3) the changes in its operations resulting from the loss of the International's subsidy; and (4) the duties of the executive director and the proposed past and current duties of the administrative secretary.

1. The Employer's Organizational Structure, Responsibilities of Staff Members and Changes in the Employer's Operations After the Loss of the International Subsidy

The Employer was established in 1997 to service the 28 AFSCME local unions in West Virginia. The paid staff included director, three council representatives, the administrative secretary and the executive director.

2. Council Representatives

The council representatives' written job description indicates that they are responsible for: (1) servicing local unions; (2) guiding local leadership in contract negotiation; (3) legislative strategy; (4) resolving workplace problems; and (5) member recruitment. The council representatives prepare and present grievances at arbitrations, assist with grievances at lower levels, conduct negotiations and train stewards. Additionally, they prepare letters, reports and newsletters and respond to members' inquiries. Prior to the June 2001 layoff of two council representatives, each council representative was responsible for local unions in about one-third of the state, where they assisted with first and second step grievances and attended local meetings. They also lobbied state and local governments, worked on the Employer's publications and website. Since the layoff, remaining council representative Kevin Church's duties have expanded to servicing local unions throughout the state, processing fourth step grievances and conducting arbitrations and negotiations. However, he no longer attends local union meetings, assists with grievances at lower steps, works on publications or the website or engages in lobbying.

3. Administrative Secretary

The written job description for the administrative secretary has been in effect since 1998. The listed duties for the position includes preparing correspondences, forms, reports and other documents from draft to final form; handling routine requests for information, screening and routing calls, delivering messages and greeting visitors. Pursuant to the job description, the administrative secretary also maintains spreadsheets, reports and data summaries, calculates revenue and expenditures, pays bills, makes bank deposits, verifies expense reports, makes meeting and conference arrangements, opens and sorts mail and maintains files. In this regard, Nancy Canterbury, who filled the administrative secretary position from October 1999 to October 2001, acted as a receptionist, greeting and directing visitors to the office, opened and handled mail, filed paper and typed some correspondences for the executive director. She also kept membership records for all AFSCME local unions in the State of West Virginia, payed bills and forwarded periodic computer-generated financial reports to the International Union's auditor. In addition, she filed, recorded and retrieved routine information in staff members' personnel files, pertaining to vacation and insurance benefits and expense reimbursement. From drafts prepared by the executive director, she typed initial responses to grievances and a response to an unfair labor practice charge which requested that the charge be deferred to the grievance procedure. However, Canterbury did not type the side letters, which were negotiated and implemented during her tenure, modifying the contract covering unit employees and there is no evidence she had regular access to any information that was not already available to the Union. Since Canterbury resigned in October 2001, the administrative secretary job has been filled by a number of temporary employees.

4. The Duties of the Executive Director

Initially, the record evidence establishes that Executive Director Ed Hartman, inter alia, has the authority to formulate, determine and effectuate management policies in the field of labor relations. Although Hartman operates “with approval of the Executive Board,” that body has not engaged in active oversight of his labor relations policy. The president of the Executive Board represents the Employer at second step grievance meetings and in arbitrations, but no one from the Executive Board regularly reviews Hartman’s labor relations policies or actions. For example, Hartman independently determined to lay off employees in June 2001, based on the budget, selected employees for layoff and reassigned their duties. Hartman made and executed the decision to hire temporary employees to fill the administrative secretary position. Hartman sent a letter terminating the contract and reopening negotiations without notifying or consulting the Executive Board, which met shortly before the letter was sent. Although some board members apparently disapprove of his action, the Executive Board has taken no action to countermand him. Additionally, side letters negotiated between the Employer and the Union modifying contractual provisions concerning office hours, health insurance out-of-pocket costs, use of sick leave for family illness and work during holiday weeks were approved and signed only by the union representative and the executive director.

Based on the foregoing, the Union’s claim that the Executive Board, not the executive director, formulates and determines labor relations policy, is without merit. The executive director regularly establishes and enforces labor relations policies without notice to or approval of the Executive Board. However, the executive director’s role in labor relations does not standing alone, make the administrative secretary a confidential employee.

5. The Duties of the Administrative Secretary in Labor Relations Matters

Because the executive director is a managerial employee with labor relations responsibilities, the administrative secretary is a confidential employee if she assists and acts in a confidential capacity to him. *B.F. Goodrich Co.*, 115 NLRB 722 (1956). The Board has held that an employee is confidential if it can be shown that the disputed employee: (1) plays some role in creating confidential labor relations documents, vis a vis, the Employer’s employees; (2) plays some role in making substantive labor related-decisions or (3) regularly has access to labor relations policy information before it becomes known to the Union or employees concerned. *Associated Daycare Services*, 269 NLRB 178 (1984).

Here, the evidence fails to show that the administrative secretary has actually performed any confidential duties for the executive director or that she performs other confidential labor relations functions. The present temporary administrative secretary, Connie Oxley, who is excluded from the contractually described unit as a temporary employee, prepared a file on her computer for contract proposals but has had no

access to the bargaining proposals which Hartman is drafting. There is no evidence that the prior administrative secretary assisted Hartman in the only previous contract negotiations in 1998.

6. Proposed New Duties of the Administrative Secretary

According to Hartman, he has not hired a permanent administrative secretary after Canterbury resigned because he was waiting until after he had filed a unit clarification petition and had the position excluded from the unit as confidential. Hartman claims the new secretary will be more involved in contract negotiations because he does not have time to negotiate a contract. Hartman anticipates that the secretary will have access to wage rate proposals that would be offered to the Union and would have information about bargaining, finances and fringe benefits before those issues were submitted to the Union in negotiations. However, the record is clear that Oxley does not currently have access to such information. Hartman asserts that the Employer needs to know the outcome of the instant unit clarification proceeding before determining exactly what the administrative secretary's duties will be, as her potential involvement in negotiations and other labor relations matters will depend on the determination. Specifically, Hartman states that if the administrative secretary is found to be confidential, she would take notes at negotiations and type revisions as they were agreed upon. However, the record fails to show that any significant changes in the administrative secretary's duties have been implemented.

The Board has consistently refused to exclude employees from an existing bargaining unit based upon speculation as to what their duties will be in the future. *Southwestern Bell Telephone*, 222 NLRB 407 (1976). In *Southwestern Bell*, the Board held:

"[E]vidence that individuals actually perform the functions asserted is the only real way to determine whether they have indeed been assigned additional duties. . . . [O]ur determination must be based on what the individuals filling those classifications actually do now, as opposed to what they speculatively may be doing in the future." Ibid. at 411.

See also, *ITT Grinnell*, 253 NLRB 584, 586 (1980). The Board has also refused to exclude an alleged confidential employee from a unit when she had not yet assumed any labor relations responsibilities. *Springhill Bank and Trust Company*, 238 NLRB 127, 128 (1978). In *Springhill*, the Board noted that labor relations work formed only a small percentage of the work of the senior confidential secretary, who was already excluded, and the performance of any labor relations work by her assistant, whose status was at issue, was speculative. Similarly, my determination of the status of the administrative secretary must be based on evidence of her current job duties, and not the duties which might be assigned to her if she were found to be confidential. Thus, I decide the issue based on my analysis of the evidence concerning the past and current functions of the administrative secretary.

7. Analysis of Past and Current Duties of the Administrative Secretary

Although secretaries with access to confidential materials may be excluded from bargaining units as confidential, the administrative secretary does not presently have access to confidential labor relations material such as personnel files, bargaining proposals or management strategy which would warrant her exclusion from the unit. The unfair labor practice responses which Canterbury typed did not include any confidential information.

The current administrative secretary, Oxley, has not participated in the formulation of the Employer's bargaining proposals. Merely typing grievance responses or proposals immediately before they are supplied to the union does not confer confidential status. *Bakersfield Californian*, supra. Rather, an employee will be found confidential only when she has access to discussions and information regarding labor relations policy before it is made known to those affected. *E & L Transport*, 327 NLRB 408 (1998). Here, there is no evidence that the administrative secretary has access to Hartman's confidential bargaining notes or to any of his confidential files with respect to the Employer's own employees.

Although the recent changes in the Employer's operations reducing the total staff under the executive director from four to two did not increase Hartman's labor relations responsibilities, the Employer contends that as a result of those changes, the administrative secretary is a confidential employee because she is more closely involved in the administration of labor relations matters. The Employer relies on *Savage Arms*, 144 NLRB 1323 (1963), as support for its position that changes in the executive director's and administrative secretary's job duties warrant a finding that the administrative secretary is confidential. However, in *Savage Arms*, the Board noted a significant increase in the manager's labor relations authority and then found that his personal secretary, who generally assisted him and handled all his mail and dictation, had become a confidential employee. In the instant case, there is no evidence of any increase in Hartman's labor relations responsibilities. Rather, his nonmanagerial duties have increased. Finally, the Employer's contention that the administrative secretary position will necessarily be more closely assisting him with labor relations matters is unsubstantiated speculation, especially since the position is not filled and the unit Hartman manages is only half its pre-reorganization size.

The evidence here does not establish that the labor relations authority of the executive director has changed in any way which mandates a finding that the secretary's status has changed. Thus, in *Washington Post*, 256 NLRB 1243 (1981), the Board declined to alter the placement of confidential secretaries who were historically excluded from a unit because the evidence did not show any reduction in the labor relations authority of the managers for whom they worked.

The Employer also argues that the administrative secretary position should be excluded from the unit because the occupant has access to employee personnel files

and could potentially investigate grievances. However, mere access to confidential information such as personnel files does not establish confidential status. *Rhode Island Hospital*, 313 NLRB 343 (1993). *Associated Day Care Services*, 269 NLRB 178 (1984), cited by the Employer in its brief, is factually distinguishable. The administrative assistants found confidential in *Associated Day Care* had been hired for a newly created position. Additionally, each worked under a center director at a facility employing 9 to 15 unit employees and regularly substituted for the center director during weekly management meetings and other absences. They checked references and licensing certifications, typed employee evaluations and discipline, and had access to minutes of weekly management meetings. In finding them confidential, the Board noted that the administrative assistants played a role in investigating grievances which would affect the decision made by management on the merits, and they would have regular access to bargaining proposals. Although the administrative assistants in *Associated Day Care* had not yet performed all of the duties, the position had only been in existence for 2 months and the incumbents had not had an opportunity yet to handle the full range of duties anticipated when they were hired. In contrast, the administrative secretary position here has been included in the existing unit for 4 years since its inception and the evidence fails to show that the incumbents performed duties which could mandate their exclusion from that unit.

The Employer's reliance on *Siemons Bakery Co.*, 224 NLRB 1571 (1976); *West Chemical Products*, 221 NLRB 250 (1975) and *Bechtel, Inc.*, 214 NLRB 906 (1974) is similarly misplaced. Although these cases hold that the amount of time an allegedly confidential employee devotes to labor relations matters is not controlling in determining confidential status, the Board emphasized that the employees were excluded as confidential because they performed their labor relations functions in the normal course of their duties. Here, the evidence does not support a conclusion that confidential labor relations functions are a regular duty of the administrative secretary. There is no evidence that she assisted with or prepared any materials for previous contract negotiations or negotiations concerning side agreements. Since June 2001, the administrative secretary has typed one unfair labor practice response and one update response on a deferred unfair labor practice charge. She also retrieved expense reimbursement and leave information regarding three grievances. Although Hartman testified that he anticipates that the administrative secretary will perform additional labor relations functions if she is found to be a confidential employee, the record does not support a finding that such functions are presently part of her normal duties.

Three other cases cited by the Employer in its brief are not applicable to the facts in this case. In *Bakersfield Californian*, supra, the Board held that the secretary to a manager who formulated, determined and effectuated labor relations policies was not a confidential employee excluded from the unit, even though she typed notes of the collective-bargaining sessions and documents related to discipline and grievances. Nor did her access to confidential files and information make her a confidential employee. In reaching this conclusion, the Board noted that the documents she typed concerned information that was either known to the union or in the process of being forwarded to the interested parties and stated that mere access to confidential information does not

establish confidential status. *Bakersfield Californian*, supra. The Board found that only the secretary who had full access to a manager's labor relations strategy notes was found to be a confidential employee. *Bakersfield Californian*, supra. Like the secretary in *Bakersfield Californian*, whom the Board found not to be confidential, the administrative secretary here does not assist the manager in a confidential capacity. She does not type contract proposals and typing the employer's bargaining notes, like the secretary in *Bakersfield Californian*, involved material already known to or in the process of being forwarded to the Union. Contrary to the Employer's claim, there is no evidence that the administrative secretary has any access to the executive director's confidential labor relations strategy notes.

Similarly, a payroll coordinator who assisted management by preparing payroll information and preparing memos on payroll problems, including the past practice, was not confidential as she had no access to the precise contract terms to which the Employer would agree. She assisted only with administrative decisions involving payroll and thus had no confidential capacity with respect to labor relations. *S. S. Joachim & Anne Residence*, supra.

E & L Transport Co., 327 NLRB 408 (1998), cited by the Employer in its brief, is also factually distinguishable. In that case, the alleged confidential secretary typed the local terminal manager's collective-bargaining recommendations which were sent to the director of labor relations. She also typed inter-office memoranda concerning labor relations at the local terminal and correspondence regarding proposed cutbacks and layoffs. In finding her to be confidential, the Board noted that she worked as the confidential secretary to the terminal manager, was entrusted with policy decisions, collective-bargaining positions and information regarding labor relations policy before it was made known to those affected. *Id.* at 409. In contrast, the evidence here fails to show that the administrative secretary actually has access to confidential labor relations information regarding the Employer's bargaining position. Although Hartman contends that she would type his bargaining proposals, if she was found to be a confidential employee, there was no evidence that she has, in fact, typed confidential material. *Inland Steel*, 308 NLRB 868 (1992) does not support the claim that the administrative secretary is confidential because the Employer does not have a separate "union relations" department to formulate labor relations policy. The evidence simply fails to show that the administrative secretary is involved in formulating such policy.

IV. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.

3. The Union represents certain employees of the Employer.
4. The administrative secretary is not a confidential employee and I will not clarify the unit to exclude the position. Accordingly, I shall dismiss the petition.

V. ORDER

It is hereby ordered that the petition be, and it hereby is, dismissed.

VI. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EDT on **September 4, 2002**. The request may **not** be filed by facsimile.

Dated: August 21, 2002

/s/ Richard L. Ahearn

Richard L. Ahearn, Regional Director
National Labor Relations Board
Region 9

Classification Index

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